

Issue: Compliance – Grievance Procedure (documents); Ruling Date: September 16, 2011; Ruling No. 2012-3094; Agency: Virginia Department of Transportation; Outcome: Agency In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Virginia Department of Transportation
Ruling Number 2012-3094
September 16, 2011

The grievant has requested a ruling regarding the alleged noncompliance with the grievance procedure of the Department of Transportation (the agency) in not providing a requested document. The grievant also asks that this Department (EDR) direct the agency to retain certain documents.

FACTS

The grievant has made numerous document requests and there have been frequent communications between the agency and the grievant regarding these requests. As to one such document request, the agency has withheld a document pursuant to a claim of attorney-client privilege and/or attorney work product. The agency also asserts that the document withheld is not relevant to the issues grieved. This document concerns the agency's response to the grievant's document request and production review. The grievant alleges that the agency does not have a sufficient basis to withhold the document from disclosure.

The grievant also expresses a concern that, given the length of time that has passed since these issues arose, certain agency records may not be preserved. He asks that EDR order the agency to "ensure a copy of specific records for a requested time period be retained by the agency as part of the current and possible future information requests related to my grievance." More specifically, the grievant requests that an archive of all e-mails within certain dates of specific individuals be kept.

DISCUSSION

The grievance statutes provide that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to the actions grieved shall be made available upon request from a party to the grievance, by the opposing party."¹ This Department's interpretation of the mandatory language "shall be made available" is that absent just cause, all relevant grievance-related information *must* be provided. "Just cause" is defined as "[a] reason sufficiently compelling to excuse not taking a required action in the grievance process."² For

¹ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

² *Grievance Procedure Manual* § 9.

purposes of document production, examples of “just cause” include, but are not limited to, (1) the documents do not exist, (2) the production of the documents would be unduly burdensome, or (3) the documents are protected by a legal privilege.³ The statute further states that “[d]ocuments pertaining to nonparties that are relevant to the grievance shall be produced in such a manner as to preserve the privacy of the individuals not personally involved in the grievance.”⁴

Withheld Document

The document withheld under the disputed claims of attorney-client privilege and/or attorney work product concerns the agency’s internal assessment of the grievant’s document request and production review. Based on the description provided about the withheld document, it is this Department’s determination that the record does not relate to the actions grieved and, therefore, need not be provided.⁵ Rather, the document relates to the agency’s internal processing of a grievance document request and does not address the substantive facts or merits of the actions grieved. Consequently, we find no requirement under the grievance procedure that such a record be provided.⁶

Document Retention

The grievant has raised concerns about possible destruction of files or an inadvertent non-retention of certain files. Although failure to retain and produce relevant documents requested during a grievance could raise issues of noncompliance, there is no provision in the grievance procedure that allows for a party to request or EDR to order an agency to maintain certain records beyond what law or policy would otherwise require. While an agency’s destruction of relevant documents could give rise to a spoliation inference at a grievance hearing⁷ or another finding of noncompliance,⁸ this Department has no credible basis to find that any improper document destruction or non-retention has taken place. The grievant’s request is denied.

This Department’s rulings on matters of compliance are final and nonappealable.⁹

Claudia T. Farr
Director

³ See, e.g., EDR Ruling No. 2008-1935, 2008-1936; EDR Ruling No. 2001QQ.

⁴ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

⁵ The claims of attorney-client privilege and/or attorney work product will not be addressed in this ruling as the question of whether the document must be provided is resolved on other grounds.

⁶ See Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

⁷ Cf. *Rules for Conducting Grievance Hearings* V(B) (permitting a hearing officer “to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents . . . as the hearing officer or the EDR Director had ordered.”).

⁸ See Va. Code § 2.2-3003(G).

⁹ See Va. Code §§ 2.2-1001(5), 2.2-3003(G).